

GIVING TAXPAYER RIGHTS A SEAT AT THE TABLE

Leslie Book*

ABSTRACT

How can Congress’s codification of the Taxpayer Bill of Rights (TBOR) make a meaningful difference in tax administration? This question will likely confront academics, policymakers, and judges in the coming years. In late 2015, Congress codified the rights that the Internal Revenue Service (IRS) administratively adopted in 2014, explicitly requiring that the Commissioner ensure that IRS employees receive training and act in accord with the codified rights. A recent article by Professors Alice Abreu and Richard Greenstein refers to the codification of TBOR as having the power to “transform the tax practice and the relationship between taxpayers and the IRS.” Yet the statute itself is silent on the practical effect of IRS violations of any of the rights and fails to include a specific remedy or enforcement mechanism when the IRS acts inconsistently with or violates those rights. In Facebook v. IRS, a federal district court concluded that at least with respect to one of the enumerated taxpayer rights (the right to appeal a decision in an independent forum), the right is not enforceable by taxpayers. This development highlights a central weakness in the current law, namely that there is no formal way to ensure that IRS employees act consistently with or even consider taxpayer rights. In this Essay, I propose a way to change this shortcoming. I argue that advocates, academics, and practitioners should focus on rulemaking as a way to operationalize taxpayer rights. Congress should explicitly require the IRS to consider the impact of guidance on taxpayer rights prior to promulgating regulations and other guidance. In so doing, Congress should rely on and expand the role of the IRS office that is deeply associated with the increased importance of taxpayer rights, the Taxpayer Advocate Service (TAS).

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INTRODUCTION

How can Congress's codification of the Taxpayer Bill of Rights (TBOR) make a meaningful difference in tax administration? This question will likely confront academics, policymakers, and judges in the next few years. In late 2015, Congress codified the rights that the Internal Revenue Service (IRS or Service) administratively adopted in 2014, explicitly requiring that the Commissioner of the IRS ensure that IRS employees receive training and act in accord with the codified rights.¹ A recent article by Professors Alice Abreu and Richard Greenstein refers to the codification of TBOR as having “the power to transform the tax practice and the relationship between taxpayers and the IRS.”² Yet the statute itself is silent on the practical effect of IRS violations of any of the rights and fails to include a specific remedy or enforcement mechanism when the IRS acts inconsistently with or violates those rights.³ A recent case concluded that, at least with respect to one of the enumerated taxpayer rights (the right to appeal a decision in an independent forum), the right is not enforceable by taxpayers.⁴ This development highlights a central weakness in the current law,

1. See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 3117 (2015) (codified as amended at I.R.C. § 7803(a)(3)).

2. Alice G. Abreu & Richard K. Greenstein, *Embracing the TBOR*, 157 TAX NOTES 1281, 1281 (2017). Professors Abreu and Greenstein have made the case for the transformative potential of TBOR despite its lack of explicit remedy and how TBOR was promoted as repackaging existing rights. See generally *id.*

3. NINA E. OLSON, NAT'L TAXPAYER ADVOCATE, HEARING ON IRS REFORM: PERSPECTIVES FROM THE NATIONAL TAXPAYER ADVOCATE 6 (2017) [hereinafter OLSON, HEARING ON IRS REFORM] (prepared statement before the U.S. House of Representatives Subcommittee on Oversight and Committee on Ways and Means) (noting that the failure of the legislation to state that taxpayers explicitly possess the rights leaves the practical effect of the legislation “murky”); see also I.R.C. § 7803.

4. *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743, at *2 (N.D. Cal. May 14, 2018). As this Essay was coming to press, the Tax Court held that the IRS administrative adoption of TBOR did not confer rights or remedies beyond the rights that taxpayers enjoyed prior to TBOR's adoption. See *Moya v. Comm'r*, No. 13343-15, 2019 WL 1714740, at *6 (T.C. Apr. 17, 2019) (challenging a notice of deficiency due to alleged violations of the right to be informed, the right to challenge the IRS, and the right to a fair and just tax system). While *Moya* concerned the legal effect of the IRS's administrative adoption, rather than the effect of the codification of TBOR, the opinion, in dicta,

namely that there is no formal way to ensure that IRS employees act consistently with or even consider taxpayer rights. In this Essay, I propose a way to change this shortcoming. I argue that we should focus on rulemaking as a way to operationalize taxpayer rights. Congress should explicitly require the IRS to consider the impact of guidance on taxpayer rights prior to promulgating regulations and other guidance. In so doing, Congress should rely on and expand the role of the IRS office that is deeply associated with the increased importance of taxpayer rights, the Taxpayer Advocate Service (TAS).

In making my claim, I propose to shift the focus on taxpayer rights away from individualized disputes between the IRS and taxpayers to the role that rights can play when the IRS promulgates guidance. Focusing on guidance has the potential to ensure that the IRS acts in a way that weighs the impact of its actions on taxpayer rights before setting in place rules and procedures that may adversely impact taxpayer rights. In other words, the starting point for my claim is that requiring the IRS to engage issues of taxpayer rights before rules are in place maximizes the impact on taxpayer rights. Further, an *ex ante* approach may be especially valuable for lower-income taxpayers, who due to a lack of resources are less likely to seek redress for harms, even assuming a court would find that a violation of a taxpayer right triggers a remedy. By requiring that the IRS consider taxpayer rights in the guidance process, it will also preserve the possibility that courts can scrutinize IRS actions that arbitrarily or unreasonably disregard or violate essential taxpayer rights.⁵ Further, an *ex ante* approach to taxpayer rights minimizes the risk that cognitive biases will make it less likely for the IRS to change rules once rules are proposed or in place,⁶ especially if the IRS failed to adequately consider the impact of the guidance on taxpayer rights when it promulgated the guidance. In addition, injecting a pre-promulgation consideration of taxpayer rights into the IRS's process will help improve quality, accountability, and public acceptance of the rules that the IRS eventually finalizes, a key insight among scholars considering legitimacy of agency guidance that is not subject to notice and comment rulemaking.⁷ Formalizing the role of TAS will help ensure a systemic approach to taxpayer rights and ensure that the agency at large considers the interest of taxpayers that may not have the resources, skills, or access to engage in the rulemaking process. In addition, an ancillary benefit of my proposal is that it strengthens TAS at a time when it has had a charismatic and powerful National Taxpayer Advocate (NTA), Nina

strongly signaled that taxpayers should not expect different results if a challenge arises due to alleged violations following codification of TBOR. *See id.* at *6–8.

5. *See infra* notes 77–80 and accompanying text.

6. Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 592 (2002) (discussing agency lock-in effects).

7. *See* Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 393 (2009) (suggesting a limited notice and comment regime to promote values that would encourage public acceptance of guidance).

Olson, whose departure may leave TAS with a shortfall in the soft powers of persuasion that are associated with the office today.⁸

In this Essay, I present a path to ensuring that the IRS more systematically addresses and considers the impact of its actions on taxpayer rights. To further that end, I propose that the IRS should address the impact of proposed rules on fundamental taxpayer rights prior to finalizing regulations and subregulatory guidance that is published in the *Internal Revenue Bulletin* (IRB). To ensure that the IRS appropriately considers and weighs the impact of regulations and subregulatory guidance, I propose a greater role for the TAS in the guidance process, by requiring the IRS to seek input and comment from the NTA on regulations and subregulatory guidance, including specifically the NTA's views on the impact of guidance on taxpayer rights.

In the spirit of the symposium, I consider the issue of taxpayer rights from a different angle than most other scholars, though it is not an exhaustive analysis of all the issues that my approach implicates. For example, I recognize but do not develop the idea that taxpayer rights are not absolute and are context dependent.⁹ In addition, I do not address concepts that might preclude or affect the timing of judicial challenges to IRS actions that may be inconsistent with my proposal, like standing,¹⁰ the doctrine of finality¹¹ and the Anti-Injunction Act (AIA).¹² Despite these limits, the Essay serves as an important roadmap for

8. Nina E. Olson, *A Personal Message from the National Taxpayer Advocate*, TAXPAYER ADVOCATE SERV.: NTA BLOG (Mar. 1, 2019), <http://taxpayeradvocate.irs.gov/news/nta-personal-message> [<http://perma.cc/U9T3-RL7Q>] [hereinafter Olson, *A Personal Message from the National Taxpayer Advocate*].

9. See Abreu & Greenstein, *supra* note 2, at 1282 (“[T]he codification of the TBOR can transform the legal environment so that demands for enforcement can be weighed by the courts on a case-by-case basis in light of all the facts and circumstances, which include the identity and attributes of the taxpayer.”).

10. See Lynn D. Lu, *Standing in the Shadow of Tax Exceptionalism: Expanding Access to Judicial Review of Federal Agency Rules*, 66 ADMIN. L. REV. 73, 89–90 (2014) (discussing how standing has been a formidable obstacle in allowing marginalized groups to play a meaningful role in IRS rulemaking).

11. See 5 U.S.C. §§ 702, 704 (2018) (explaining that judicial review is applicable for challenges to “final agency action” brought by parties “adversely affected or aggrieved”). When an agency action is considered final is at times difficult to determine and subject to inconsistent judicial approaches, with one approach being a more pragmatic take and the other more formalistic. See William Funk, *Final Agency Action After Hawkes*, 11 N.Y.U. J.L. & LIBERTY 285, 293–307 (2017) (tracing the case law roots of differing approaches to determining when agency guidance is considered final); Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 385 (2007) (identifying inconsistencies and problems with court application of the finality doctrine). Compare *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743, at *17 (N.D. Cal. May 14, 2018) (explaining the rules regarding access to Appeals promulgated in a revenue procedure not considered final agency action), with *Stauffer v. IRS*, 285 F. Supp. 3d 474, 482 (D. Mass. 2017) (denying the Service’s motion to dismiss a claim for refund not in compliance with Rev. Proc. 99-21 and finding that the Revenue Procedure and the rules the IRS created to prove financial disability are subject to arbitrary and capricious review under the Administrative Procedure Act).

12. Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683, 1687 (2017) (examining the AIA and arguing for courts to embrace a narrower reach of the AIA and to allow for more frequent pre-enforcement challenges). For a differing view and critique of

making taxpayer rights more foundational in tax administration, including how Congress can make relatively simple and efficient changes to trigger the explicit statutory requirement in Section 7803 that IRS employees act “in accord with” taxpayer rights.¹³

Before proceeding with the Essay, I offer a key introductory consideration. The growing prominence associated with taxpayer rights is fueled in part by a view that there is a positive correlation between enhanced taxpayer rights and increased voluntary compliance.¹⁴ There is a strong intuition that an agency that acts in accord with taxpayer rights will increase a tax system’s legitimacy in the eyes of the public and that a tax system grounded in legitimacy will encourage taxpayers to comply voluntarily.¹⁵ This view is not universally embraced. Some scholars have questioned the relationship between taxpayer rights and voluntary compliance, especially the lack of conclusive empirical evidence showing that measures that are designed to increase trust lead to increased voluntary compliance.¹⁶ This skepticism seems apt when there are significant countervailing examples that likely erode the public’s sense of the tax system’s legitimacy, like highly publicized stories of our nation’s political leaders and other elites engaging in dubious and, in some instances, illegal practices to avoid and evade tax liability.¹⁷ Even if there is less than full agreement that the

the Hickman and Kerska article, see Daniel Hemel, *The Living Anti-Injunction Act*, 104 VA. L. REV. ONLINE 74, 84 (2018), which critiques their proposal on both policy and legal grounds and emphasizes the role the AIA plays in alleviating resource burdens on “already-strained regulatory resources.”

13. I.R.C. § 7803(a)(3) (2018).

14. See Erich Kirchler et al., *Enforced Versus Voluntary Tax Compliance: The “Slippery Slope” Framework*, 29 J. ECON. PSYCHOL. 210, 210–25 (2008) (summarizing research in differing fields finding that agency actions that increase trust will improve voluntary compliance); Nina E. Olson, *Procedural Justice for All: A Taxpayer Rights Analysis of IRS Earned Income Credit Compliance Strategy*, 22 ADVANCES TAX’N 1 (2015), http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/AdvancesTaxation_Vol22_Olson.pdf [<http://perma.cc/ZK9E-8JG9>]; see also Katharina Gangl et al., *Tax Authorities’ Interaction With Taxpayers: A Conception of Compliance in Social Dilemmas by Power and Trust*, 37 NEW IDEAS PSYCHOLOGY 13, 21 (2015) (“To change an antagonistic climate into a service climate, the measures of coercive power, such as controls and punishments, have to be combined with accepted, legitimate power. Once legitimate power is established, reason-based trust is likely to increase and, as a result, a service climate is established with voluntary tax cooperation.”).

15. For a discussion of the relationship between legitimacy and compliance, see STEVE M. SHEFFRIN, *TAX FAIRNESS AND FOLK JUSTICE* 161 (2013). The procedural justice literature has heavily influenced the thinking of those who have promoted taxpayer rights as a foundational component of tax administration. For a summary, see Abreu & Greenstein, *supra* note 2, at 1291–94, which refers to the work of Tom Tyler and its apparent influence on the NTA and her advocacy for taxpayer rights.

16. John Bevacqua, *Taxpayer Compliance Effects of Enhancing Taxpayer Rights—A Primer for Discussion of a Dedicated Research Agenda*, 4 J. TAX ADMIN. 6, 6 (2018) (noting that there is a “dearth of clear empirical evidence to support any unimpeachable presumption of a correlation (positive or otherwise) between enhanced taxpayer rights and greater taxpayer willingness to comply, let alone evidence as to the strength of any such correlation if it, in fact, exists”). A different though related question is the relationship between traditional enforcement activities and future taxpayer compliance. For a critique of the view that traditional enforcement activities crowd out taxpayers’ intrinsic motivations to voluntarily comply, see Leandra Lederman, *Does Enforcement Reduce Voluntary Tax Compliance?*, 2018 BYU L. REV. 623, 627.

17. David Barstow et al., *Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father*, N.Y. TIMES (Oct. 2, 2018), <http://nyti.ms/2P0MCKi> [<http://perma.cc/CW2F-9U69>] (presenting a

adoption and codification of taxpayer rights furthers voluntary compliance, I approach this Essay from the perspective that a tax system that incorporates taxpayer rights helps ensure that the government treats all before it with a dignity that citizens should experience when interacting with the sovereign, especially in such a fundamental relationship as that between taxpayer and tax agency.¹⁸ Treating people who interact with the tax system with dignity has a value beyond the instrumental effect on increased compliance.¹⁹ For purposes of this Essay, I am assuming that the codification of taxpayer rights is an important and beneficial development for tax administration, though I believe that future research should more fully explore the relationship between fairness (and perceptions of fairness) and voluntary compliance. Simply put, even in the absence of a direct link between taxpayer rights and increased voluntary compliance, the government should strive to treat its citizens with dignity. Ensuring that the IRS more fully and formally considers the impact of its rules on taxpayer rights before it sets procedures or interprets statutory language that has an impact on taxpayer rights is a relatively simple way of doing so.

This Essay proceeds as follows. In Section I, I briefly give background on the codification of TBOR and on the forms of IRS guidance. In Section II, I discuss my proposals in greater detail. In so doing I connect my proposals to broader administrative law scholarship that has looked for ways to ensure greater agency fidelity to interests that may reflect marginalized populations or concerns that differ from a primary agency objective. I briefly conclude by addressing some of the likely criticism and limitations of my proposal.

comprehensive report alleging that the Trump family has engaged in tax schemes); Jesse Drucker, *U.S. Prosecutors Bring Their First Charges over the Panama Papers*, N.Y. TIMES (Dec. 4, 2018), <http://nyti.ms/2DYSoJo> [<http://perma.cc/8FTA-JRXZ>] (highlighting prosecutions stemming from release of information showing steps that wealthy citizens have taken to hide assets in offshore tax havens).

18. Bevacqua, *supra* note 16, at 21 (arguing that even in the absence of a positive correlation between taxpayer rights and increased compliance “enhancing taxpayer rights is a worthy pursuit *per se*, irrespective of its effects on taxpayer voluntary compliance behaviour”). That taxpayer rights have a strong independent value apart from their relationship to voluntary compliance is closely related not only to the literature that prioritizes procedural justice generally but also the strand that focuses less on specific outcome and more on the notion that people have an inherent worth that necessitates the sovereign treating individuals with dignity. For background on the design of a legal system and how design may relate to an individual’s sense of self-worth and autonomy, see Margaret Hagan & Miso Kim, *Design for Dignity and Procedural Justice*, which notes that a legal system predicated on procedural justice emphasizes the dignity of the individual person and an individual’s perceived control within the system, in *ADVANCES IN INTELLIGENT SYSTEMS AND COMPUTING, PROCEEDINGS OF THE APPLIED HUMAN FACTORS AND ERGONOMICS INTERNATIONAL CONFERENCE, 2017*, at 5 (2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994354 [<http://perma.cc/5T9S-3XMQ>].

19. There is a strong relationship between the concept of human dignity and the spread of broader international human rights movements. See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 664 (2008).

I. BACKGROUND: A BRIEF PRIMER ON TAXPAYER RIGHTS, IRS GUIDANCE, AND ADMINISTRATIVE LAW

A. *The Codification of Taxpayer Rights*

In recent years, both the IRS and Congress have taken significant steps to acknowledge the value of taxpayer rights. Starting in the 2007 Annual Report to Congress, the NTA has emphasized the importance of taxpayer rights to tax administration.²⁰ In her 2013 Woodworth Memorial Lecture, she situated taxpayer rights as part of a broader class of fundamental human rights:

At their core, taxpayer rights are *human* rights. They are about our inherent *humanity*. Particularly when an organization is large, as is the IRS, and has power, as does the IRS, these rights serve as a bulwark against the organization's tendency to arrange things in ways that are convenient for itself, but actually dehumanize us. Taxpayer rights, then, help ensure that taxpayers are treated in a humane manner.²¹

She continued to press the issue, in testimony and in subsequent reports to Congress.²² In 2014, the IRS administratively adopted a taxpayer bill of rights, listing the following in IRS Publication 1:

1. The Right to Be Informed
2. The Right to Quality Service
3. The Right to Pay No More than the Correct Amount of Tax
4. The Right to Challenge the IRS's Position and Be Heard
5. The Right to Appeal an IRS Decision in an Independent Forum
6. The Right to Finality
7. The Right to Privacy
8. The Right to Confidentiality
9. The Right to Retain Representation
10. The Right to a Fair and Just Tax System²³

In late 2015, Congress codified the rights that the IRS administratively adopted, explicitly providing that “[i]n discharging his duties, the Commissioner shall ensure that [IRS] employees . . . are familiar with and act in accord with taxpayer rights as afforded by other provisions of [Title 26], including” the ten taxpayer rights the IRS administratively adopted the previous year.²⁴ Despite the generally accepted sense that taxpayer rights are a positive development in tax

20. See, e.g., 2 NAT'L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS 478–80 (2007), http://www.irs.gov/pub/tas/arc_2007_vol_1_legislativerec.pdf [<http://perma.cc/5247-QD7A>].

21. Nina Olson, *A Brave New World: The Taxpayer Experience in a Post-Sequester IRS*, 139 TAX NOTES 1189, 1190 (2013) [hereinafter Olson, *A Brave New World*].

22. For a detailed history of the progression of taxpayer rights in U.S. tax administration, including the crucial role played by NTA Olson, see Abreu & Greenstein, *supra* note 2, at 1285–89.

23. IRS, PUBLICATION 1, YOUR RIGHTS AS A TAXPAYER, <http://www.irs.gov/pub/irs-prior/p1--2014.pdf> [<http://perma.cc/24YC-KVDB>] (as revised in 2014); I.R.S. News Release IR-2014-72 (June 10, 2014), <http://www.irs.gov/pub/irs-news/IR-14-072.pdf> [<http://perma.cc/F9PE-QKJC>].

24. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 3117 (2015) (codified as amended at I.R.C. § 7803(a)(3)).

administration,²⁵ the 2015 legislation failed to include a specific remedy or enforcement mechanism for when the IRS acts inconsistently with or violates those rights.²⁶ As the statute does not explicitly exclude a remedy, taxpayers and advocates are questioning whether alleged IRS violations of an identified taxpayer right may have an impact on specific tax controversies with the IRS.²⁷ For example, in a highly publicized case, Facebook, facing a multibillion dollar transfer-pricing dispute in Tax Court, unsuccessfully argued in a separate suit in federal district court that codification of taxpayer rights generally and the right to appeal a decision of the IRS in an independent forum specifically gave it a right to a conference with the IRS Appeals Division in a Tax Court deficiency case that IRS Counsel had declined to refer to Appeals for settlement.²⁸

As the NTA has noted, despite the *Facebook* loss other advocates are pressing the issue in different settings and it is an “open question” as to whether a court could find that the rights are legally cognizable if the IRS violates a fundamental taxpayer right.²⁹ Keith Fogg, Richard Greenstein, and Leandra Lederman have focused on this important question in this Symposium.³⁰ Despite the importance of this issue, and the almost certainty that in the near future we will see other opinions directly considering the impact of TBOR in specific disputes, policymakers and scholars have also noted that there are ways beyond individual tax disputes in an enforcement proceeding to operationalize taxpayer rights. For example, Amanda Bartmann has argued that educating taxpayers, educating and training IRS employees, and integrating taxpayer rights into the ways the IRS measures success are key ways to inject taxpayer rights into tax administration.³¹ Similarly, Susannah Camic Tahk has emphasized that the IRS

25. See generally Abreu & Greenstein, *supra* note 2 (emphasizing that a codified taxpayer bill of rights has the power to transform the relationship between taxpayers and the IRS).

26. OLSON, HEARING ON IRS REFORM, *supra* note 3, at 6 (“If a taxpayer were to assert that the IRS had violated one of the TBOR rights, it is open to question whether a court would find the rights are legally cognizable.”).

27. E.g., T. Keith Fogg, *Can the Taxpayer Bill of Rights Assist Your Clients?*, 91 TEMP. L. REV. 705, 707 (2019) (“Now that taxpayers have these rights, the question remains: What good do they do?”).

28. *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743, at *12–14 (N.D. Cal. May 14, 2018). The district court in *Facebook* declined to find that the codification of TBOR created a new substantive right to an administrative appeal, *id.*, but there are still unanswered questions surrounding the issue of enforceability, including the possibility that tax cases not involving a deficiency where courts review IRS actions under an abuse of discretion standard, like collection due process cases, whistleblower actions, or passport revocation disputes, may allow for creative advocates to argue and judges to conclude that the codification of taxpayer rights should at a minimum influence how a judge determines a particular case and perhaps even lead a court to conclude that the IRS abused its discretion by failing to act in accord with taxpayer rights.

29. OLSON, HEARING ON IRS REFORM, *supra* note 3, at 6.

30. See generally Fogg, *supra* note 27; Richard K. Greenstein, *Rights, Remedies, and Justice: The Paradox of Taxpayer Rights*, 91 TEMP. L. REV. 743 (2019); Leandra Lederman, *Is the Taxpayer Bill of Rights Enforceable?* (Ind. Univ. Maurer Sch. of Law, Research Paper No. 404, 2019), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3365777 [<http://perma.cc/C9B8-DWWK>].

31. See Amanda Bartmann, *Making Taxpayer Rights Real: Overcoming Challenges To Integrate Taxpayer Rights into a Tax Agency's Operations*, 69 TAX LAW. 597, 600–01 (2016).

should more directly consider and highlight taxpayer rights when communicating with taxpayers in specific correspondence in the audit process.³² Bartmann and Tahk's suggestions are useful ways for the IRS to consider taxpayer rights and have the potential for helping taxpayers. As I suggest below, the IRS has the potential for acting in a manner consistent with taxpayer rights if it considers those rights when it issues guidance to the public in the form of regulations and other guidance documents it issues outside the regulatory process.

B. *The Various Ways that the IRS Issues Guidance*

Before providing a broad outline of IRS rulemaking, it may be helpful to understand that the IRS's practice when it comes to issuing guidance differs in some respects from other agencies. The IRS's practice of referring to regulations as "guidance" and treating the other documents it publishes in the weekly IRB as binding (at least on its employees) non-regulatory guidance differs from other federal agencies, which generally distinguish regulations published in the *Federal Register* and guidance, and treat all guidance as nonbinding.³³ To reflect this difference, for purposes of this Essay, I frequently refer to documents other than regulations that the IRS publishes in the IRB as *subregulatory guidance*.

The Treasury Department has responsibility for administering the tax system.³⁴ The Secretary of the Treasury delegates to the Commissioner the responsibility for administering and enforcing tax laws.³⁵ Within the broad authority to administer is the power to issue guidance. To that end, Congress provides the Secretary with general authority to make "all needful rules and regulations for the enforcement of [Title 26]."³⁶ The Service solicits the public for input for what guidance the public believes is needed and publishes what it refers to as an annual Priority Guidance Plan, which identifies and prioritizes issues that it believes need to be addressed through regulations and other published administrative guidance.³⁷

32. See Susannah Camic Tahk, *The New Welfare Rights*, 83 BROOK. L. REV. 875, 916–31 (2018) (presenting the results of a pilot experiment that tested the importance of rights-based communication with individuals facing simulated correspondence examination letters).

33. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-720, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATION AND GUIDANCE 5 n.20 (2016).

34. I.R.C. § 7801(a)(1) (2018). For a detailed discussion of the various types of IRS guidance, see MICHAEL I. SALTZMAN & LESLIE BOOK, *IRS PRACTICE & PROCEDURE* ¶¶ 3.02–3.03 (2019); Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 DUKE L. J. 1673, 1676–77 (2014) [hereinafter Camp, *A History of Tax Regulation*]; and Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323 (2008).

35. I.R.S. Treas. Order 150-10 (Apr. 22, 1982).

36. I.R.C. § 7805(a). In addition, there are hundreds of specific grants of regulatory authority within differing sections of the Internal Revenue Code. Camp, *A History of Tax Regulation*, *supra* note 34, at 1676.

37. IRM 32.1.1.4.1 (Aug. 2, 2018); IRS, PRIORITY GUIDANCE PLAN, <http://www.irs.gov/privacy-disclosure/priority-guidance-plan> [<http://perma.cc/S4DT-RTZU>] (last updated Apr. 5, 2019).

Treasury regulations are drafted by attorneys in the Office of Chief Counsel, often in coordination with members of IRS operating divisions and with Treasury’s Office of Tax Policy, and are subject to approval of the Commissioner and final approval by the Treasury Secretary or his delegate.³⁸ Regulations are published in the *Federal Register*. In addition to regulations, the IRS issues many less formal guidance documents that are not published in the *Federal Register*, which it compiles and publishes in the IRB.³⁹ Those guidance documents in the IRB include revenue rulings, revenue procedures, announcements, and Office of Chief Counsel notices.⁴⁰ The U.S. Government Accountability Office (GAO) has a helpful table detailing a summary of the differing types of guidance, with a brief description and examples illustrating the difference among them:

FIGURE 1⁴¹

Table 1: Descriptions and Examples of IRS Guidance Types Published in the Internal Revenue Bulletin		
Type	Description	Example
Regulation ^a	Treasury’s and IRS’s interpretation of how a particular Internal Revenue Code (IRC) section is to be applied. Final regulations carry the force and effect of the law. Proposed regulations convey the IRS’s position on a topic.	T.D. 8784 (REG-122488-97) provided rules for substantiating certain business expenses.
Revenue Ruling	An official interpretation of the IRC, related statutes, tax treaties or regulations as applied to a specific set of facts.	Rev. Rul. 2006-56 provided guidance on the tax treatment of reimbursements to employees for certain travel-related expenses.
Revenue Procedure	An official statement of a procedure that affects the rights or duties of taxpayers or other members of the public under the IRC, related statutes, tax treaties and regulations.	Rev. Proc. 2010-51 specified how taxpayers can compute deductible automobile expenses by applying a mileage rate.
Notice	A public pronouncement that may contain guidance that involves substantive interpretations of the IRC or other provisions of law.	Notice 2016-1 announced a change to the mileage rate used to deduct certain automobile expenses.
Announcement	A public pronouncement that has only immediate or short-term value.	Announcement 2015-31 notified taxpayers of amendments to previously issued guidance.

Source: GAO analysis of IRS documents. (GAO-16-720)

^aTemporary or final regulations called Treasury Decisions (TDs) take effect upon a specified date after they are published in the Federal Register. Proposed regulations do not take effect upon publication; rather they only become effective when issued as final regulations after Treasury and IRS have considered public comments on the proposed regulations.

In addition to documents that it publishes in the *Federal Register* and IRB, the IRS also communicates to the public about its views and interpretations of the tax law in a variety of different ways, including in tax forms, instructions to

38. IRM 32.1.1.3.1 (Aug. 2, 2018); IRM 32.1.1.4.6 (Sept. 23, 2011). In 2018, the Treasury Department and the Office of Management and Budget (OMB) agreed to reverse the longstanding practice of exempting tax regulations from OMB review. See Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455, 457–59 (2018) (discussing the historical background for the exemption and the changes, including Treasury’s obligation to prepare a cost-benefit analysis of any regulation projected to have an annual nonrevenue effect on the economy of \$100 million or more and review of other regulations deemed significant or that raise novel legal or policy issues).

39. The IRS also includes regulations in the IRB, as well as other documents, including statements of acquiescence or nonacquiescence with legal decisions involving interpretations of the tax law. For a useful summary of the various types of guidance documents the IRS issues, see U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 33, at 7.

40. *Id.* at 9.

41. *Id.* at 10 tbl. 1.

the forms, the *Internal Revenue Manual* (IRM), and through information it posts on its website, www.irs.gov.⁴²

The use of one kind of guidance relative to another has significant practical differences, including the deference that a court will give to legal interpretations in the guidance and whether the IRS itself will be bound by the positions taken in the document. For example, Treasury regulations have the force and effect of law and are binding on taxpayers and the IRS.⁴³ While the subregulatory guidance the IRS publishes in the IRB does not have the same force and effect as regulations, taxpayers can generally rely on it, confident that the IRS itself will generally be bound by the positions it takes.⁴⁴ For other sources outside the IRB (like information on its website, instructions, and forms), the IRS states that the information is a “good source of general information” but warns taxpayers that the sources are not authoritative.⁴⁵ In addition, the internal agency procedures differ depending on the type of guidance issued.⁴⁶ The IRS policies for designation, prioritizing, and publishing guidance are found in a portion of the IRM known as the Chief Counsel Directives Manual (CCDM).⁴⁷ The CCDM outlines the varying procedures the IRS follows when issuing regulatory and subregulatory guidance, including ensuring that IRS complies with executive orders, other statutory limits (like the Regulatory Flexibility Act⁴⁸ and the Paperwork Reduction Act⁴⁹), and the IRS’s views of general administrative law requirements found within the Administrative Procedure Act (APA).⁵⁰

C. Relationship of IRS Guidance to Broader Principles of Administrative Law

In the last decade, there has been an increased amount of attention directed toward the relationship between IRS practices and broader norms of administrative law.⁵¹ As Professor Andy Grewal aptly framed the inquiry, much

42. *Id.* at 8–9.

43. SALTZMAN & BOOK, *supra* note 34, ¶ 3.02[2][b] (quoting ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947)). In addition, the degree of deference that courts give to regulations, as compared to subregulatory guidance, differs considerably. *Compare, e.g., id.* ¶ 3.02[4] (“Judicial Deference to Agency Interpretations in Regulations”), *with id.* ¶ 3.03[1][b] (“Legal Effect of Revenue Rulings”), *and id.* ¶ 3.03[2][b] (“Legal Effect of Revenue Procedures”).

44. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 33, at 7–9.

45. *Id.* at 8 (quoting IRM 4.10.7.2.8 (Jan. 1, 2006)).

46. *Id.* at 15–17.

47. The portion of the CCDM addressing guidance generally is found in the IRM at IRM 32 (last updated Apr. 12, 2019). The specific portion addressing publishing regulations is found Part 32.1, the Chief Counsel Regulations Handbook, and the portion addressing subregulatory guidance is found in Part 32.2, the Chief Counsel Publication Handbook.

48. 5 U.S.C. §§ 601–612 (2018).

49. 44 U.S.C. §§ 3501–3521 (2018).

50. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 33, at 3–4.

51. A useful place to begin an academic inquiry into this is an excellent series of articles that appeared in Volume 63 of the *Duke Law Journal*, which published the proceedings of a symposium entitled *Taking Administrative Law to Tax*. See Amandeep S. Grewal, *Taking Administrative Law to Tax*, 63 DUKE L.J. 1625 (2014), for the foreword situating the articles and discussion of the implications of the extending administrative law doctrines to tax practice. Relatedly, see Stephanie

of the attention is on how “long-overlooked administrative-law doctrines . . . may shape tax practice.”⁵² Scholars are examining the relationship between tax law and administrative law, with some arguing that tax exceptionalism still has an important role to play⁵³ and others pushing back and often critiquing the IRS’s lack of fidelity to administrative law more generally.⁵⁴ While there are a number of ambiguities and areas within this inquiry that await further legal development, there are some key foundational administrative law concepts that are necessary to understand and help inform my approach in how the IRS can best operationalize taxpayer rights in the rulemaking process.

As a starting point, the APA defines a rule as an “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”⁵⁵ Rules that carry the force and effect of law are known as legislative rules.⁵⁶ These rules are to be distinguished from nonlegislative rules, such as interpretive rules and policy statements, which lack the force and effect of law.⁵⁷ Generally, when an agency promulgates legislative rules, or rules made pursuant to congressionally delegated authority, the exercise of that authority is governed by the APA’s informal rulemaking procedures.⁵⁸ Those informal rulemaking procedures require an agency to inform the public of its plans to promulgate a rule, offer interested persons an opportunity to participate through the submission of written comments, and review and respond to comments that raise significant regulatory issues.⁵⁹ Upon issuing final regulations, the agency must include a “concise general statement of their basis and purpose.”⁶⁰ These requirements are sometimes referred to in shorthand as notice and comment rulemaking. The APA provides four main exceptions that allow agencies to bypass notice and comment rulemaking. Those exceptions apply to interpretative rules, statements of agency policy, procedural rules, and

Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax’s Exceptional Regulatory Process*, 35 VA. TAX REV. 553 (2016) [hereinafter McMahon, *The Perfect Process*] for an excellent discussion of IRS rulemaking authority.

52. Grewal, *supra* note 51, at 1625.

53. See, e.g., McMahon, *The Perfect Process*, *supra* note 51, at 612–13; James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1118–19 (2015).

54. See, e.g., Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1159 (2008).

55. 5 U.S.C. § 551(4) (2018).

56. David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 286 (2010). The APA does not use the word legislative; rather, it uses the term “interpretative” to describe rulemaking that is not subject to the notice and comments described below. 5 U.S.C. § 553(b); SALTZMAN & BOOK, *supra* note 34, ¶ 3.02[2][a].

57. TODD GARVEY, CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 7 (2017).

58. See 5 U.S.C. § 553. Agency rules are typically promulgated through the informal rulemaking process, though there are limited circumstances when agencies must follow formal rulemaking requirements that impose trial-like procedures. GARVEY, *supra* note 57, at 3.

59. See 5 U.S.C. § 553.

60. *Id.* § 553(c).

when the notice and comment regime is “impracticable, unnecessary, or contrary to the public interest.”⁶¹

All of the tax guidance the IRS issues constitutes rules under the APA.⁶² The IRS takes the position that the guidance it issues, including most regulations, is exempt from notice and comment rulemaking.⁶³ With respect to regulations, the IRS’s general view, supported in part by historical practice, has been that regulations issued pursuant to Section 7805(a) rather than through a grant of specific authority in a particular provision are interpretative rules and not subject to the notice and comment rulemaking requirements.⁶⁴ This view has been subject to significant academic criticism, and in any event, in most (though not all) instances the IRS promulgates regulations in a manner roughly consistent with the notice and comment requirements under the APA.⁶⁵ Recent cases have agreed with the academic criticism and have found that the Treasury

61. *Id.* § 553(b).

62. Camp, *A History of Tax Regulation*, *supra* note 34, at 1678.

63. IRM 32.1.1.2.6 (Sept. 23, 2011) (“Most IRS/Treasury regulations are considered interpretative because the underlying statute implemented by the regulation contains the necessary legal authority for the action taken and any effect of the regulation flows directly from that statute.”).

64. For the historical context of the IRS view, see Camp, *A History of Tax Regulation*, *supra* note 34, at 1714, which discusses how the common view at the time of and predating the APA was to consider Treasury regulations as interpretative rules despite I.R.C. Section 7805 and its explicit granting of legislative rulemaking authority to the Secretary of the Treasury and his delegates. For more on the historical distinction between regulations issued pursuant to the catchall provision of Section 7805(a) and specific grants of authority in a particular provision, and how IRS has continued to treat regulations issued under Section 7805(a) rather than a specific grant of authority as interpretative, see Stephanie Hunter McMahon, *Tax as Part of a Broken Budget: Good Taxes Are Good Cause Enough*, 2018 MICH. ST. L. REV. 513, 549–50 (noting the historical justification for treating most regulations as interpretative and suggesting that Congress has recognized the IRS perspective through its adoption in the Regulatory Flexibility Analysis Act as applying to interpretative regulations issued by Treasury). Despite the official view, as this Essay was coming to press, Treasury issued a policy statement that announced its intent to comply with notice and comment rulemaking even though it retains the official position that regulations are interpretative rather than legislative. DAVID J. KAUTER & BRENT J. MCINTOSH, DEP’T OF THE TREASURY, POLICY STATEMENT ON THE TAX REGULATORY PROCESS 1 (2019), <http://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process.pdf> [<http://perma.cc/WE62-XKRT>]; see Donald L. Korb et al., *Is Treasury’s Policy Statement on the Regulatory Process Pro-Taxpayer?*, 163 TAX NOTES 565, 565 (2019) (noting that Treasury has not abandoned its legal view that most Treasury regulations are not technically required to be issued using notice and comment rulemaking).

65. Though not precisely. See, e.g., Stephanie Hunter McMahon, *Pre-Enforcement Litigation Needed for Taxing Procedures*, 92 WASH. L. REV. 1317, 1331 (2017) [hereinafter McMahon, *Pre-Enforcement Procedures*] (critiquing the practice of simultaneously issuing proposed and binding temporary regulations, “resulting in a delayed comment period until after publication of guidance that is binding”); see also Kristin Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with the Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1748 (2007) (critiquing the Treasury practice of treating regulations as exempt from notice and comment rulemaking requirements and concluding that forty percent of regulations issued in a two-year period are susceptible to challenge for violating APA notice and comment requirements). But see Camp, *A History of Tax Regulation*, *supra* note 34, at 1714 (suggesting that the pre-APA history of tax regulation supports the view of tax regulations as interpretative though raising for future research the question as to whether changes in tax administration or administrative law concepts should lead to an abandonment of the historical view of tax regulations).

regulations at issue were legislative rules and thus subject to the notice and comment requirements of the APA, including the requirement that the IRS has to review public comments and provide a reasoned basis for its conclusions.⁶⁶

In sum, when promulgating a regulation, the IRS typically engages in the following steps⁶⁷:

1. It internally considers a variety of factors concerning a proposed rule.
2. It publishes a notice of proposed rulemaking in the *Federal Register*.⁶⁸
3. It provides an opportunity for the public to comment on the proposed rule (including at times hearings where witnesses may present information or testimony).
4. After considering “relevant matter presented”⁶⁹ it takes action, including modifying, finalizing or withdrawing the proposed rule.

Generally speaking, steps 2 and 3 above are the notice and comment part of the informal rulemaking process. The APA provides that agency action is unlawful if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁷⁰ To avoid a court holding that its rulemaking is arbitrary or capricious, the agency must engage in “reasoned decisionmaking.”⁷¹ Determining whether an agency has engaged in reasoned decisionmaking is often referred to as “hard-look” review, and it requires a court to examine whether at the time the agency finalized or modified the rule it did so using a contemporaneous rationale that justified its outcome.⁷² Hard-look review

66. See *SIH Partners LLLP v. Comm’r*, 150 T.C. No. 3, at 8 (2018) (treating regulations issued under the general authority of Section 7805 as legislative rules and subject to APA notice and comment requirements), *appeal docketed*, No. 18-1862 (3rd Cir. Apr. 23, 2018).

67. Rules of “agency organization, procedure, or practice” are only exempt from the notice and comment “subsection” of Section 553. 5 U.S.C. § 553(b)(A) (2018). In addition, Section 553(b)(B) allows for avoiding notice and comment for good cause, after the agency concludes that the procedures are “impracticable, unnecessary, or contrary to the public interest.” *Id.* § 553(b)(B).

68. The Service occasionally publishes an Advanced Notice of Proposed Rulemaking, which “describes a problem or situation, announces that the agency is considering regulatory action, describes the agency’s anticipated regulatory approach, and seeks input from the public about the issues, the need for regulation, and the adequacy of the agency’s proposed regulatory action.” IRM 32.1.1.2.1 (Aug. 2, 2018).

69. 5 U.S.C. 553(c).

70. *Id.* § 706(2)(A).

71. GARVEY, *supra* note 57, at 15. A failure to comply with required procedures can result in a court nullifying the agency rulemaking, which could lead to either the court vacating the rule, thereby requiring the agency to begin the process again, or a remand to the agency, thereby requiring the agency to remedy the defect and reissue the rule. McMahon, *supra* note 64, at 553 (discussing how some courts believe the APA requires courts to vacate such agency rulemakings while other courts believe they have the power to remand).

72. *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). While on its face this rule seems reasonable, it has led to criticism that it has contributed to slowing down and adding to the costs of agency rulemaking. For a helpful summary of the scholarship both in favor of the hard look and against, see, for example, Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the “Hard Look,”* 92 NOTRE DAME L. REV. 331, 379 (2016), which summarizes the debate and suggests that the courts relax

requires a court to consider IRS explanations in the preamble to a final regulation, with an inquiry that will focus on whether the regulations as adopted adequately addressed commenters' concerns and the reasonableness of the regulatory choices made in light of the evidence and explanation at the time of the regulation's adoption.⁷³

The IRS view, which is generally supported by courts and many scholars,⁷⁴ is that subregulatory guidance is exempt from notice and comment rulemaking to the extent that it is not a disguised effort at promulgating a legislative rule. Despite the absence of a required comment period, courts can apply the arbitrary and capricious standard to evaluate the reasonableness of choices that the IRS makes in promulgating those guidance documents as illustrated by a recent case out of the federal district court in Massachusetts, *Stauffer v. IRS*.⁷⁵ *Stauffer* involved an executor of an estate who attempted to prove that his deceased father was disabled for purposes of the financial disability rules of Section 6511(h).⁷⁶ Those rules toll the statute of limitations on filing refund claims when an individual was considered disabled.⁷⁷ Section 6511(h)(2)(A) provides that an individual is financially disabled if the individual is unable to manage his financial affairs because he has a medically determinable (i.e., verifiable) physical or mental impairment that (1) can be expected to result in death, (2) has lasted for a period of not less than twelve months, or (3) can be expected to last for a continuous period of not less than twelve months.⁷⁸ Section 6511(h)(2)(A) also provides that “[a]n individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished in such form and manner as the Secretary may require.”⁷⁹ The Service has promulgated Revenue Procedure 99-21 that sets forth the Service rules on establishing that a person is financially disabled for these purposes, including the requirement that an individual claiming financial disability submit a written statement signed by a physician qualified to determine the individual's disability.⁸⁰ In defining physician for these purposes, the revenue procedure cross-references a portion

the bar on an agency using post hoc rationales so long as they are “based on information exposed to outside scrutiny during the notice-and-comment process.”

73. See GARVEY, *supra* note 57, at 14.

74. To be sure there is some disagreement with this conclusion. See, e.g., Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 240–42 [hereinafter Hickman, *IRB Guidance*] (questioning whether some IRB guidance should be subject to notice and comment rulemaking due to retroactive application of regulations based on IRB publication and possible penalty imposition for noncompliance); see also *Am. Inst. of Certified Pub. Accountants v. Comm'r*, 746 F. App'x 1, 12 (D.C. Cir. 2018) (concluding that an IRS revenue procedure detailing requirements for unlicensed return preparers to represent taxpayers in examinations does not constitute a legislative rule and is not required to be promulgated using notice and comment procedures).

75. 285 F. Supp. 3d 474 (D. Mass. 2017).

76. *Stauffer*, 285 F. Supp. 3d at 481.

77. I.R.C. § 6511(h)(1) (2018).

78. *Id.* § 6511(h)(2)(A).

79. *Id.*

80. Rev. Proc. 99-21, 1999-17 I.R.B. 18.

of the Social Security Act, which essentially limits the letter signer to a qualified “doctor of medicine or osteopathy legally authorized to practice medicine and surgery” to prove the taxpayer’s disability.⁸¹ This does not include psychologists.⁸² Stauffer had a psychologist’s letter, and the Service argued that the letter was insufficient under the wide discretion that Congress gave it to establish a procedural rule that found its way in the revenue procedure.⁸³ In rejecting the IRS’s motion to dismiss because of the inadequacy of the letter, the district court noted that while the revenue procedure embodied a procedural rule, it did not exempt the Service from court review under the arbitrary and capricious standard:

Under the Administrative Procedure Act, 5 U.S.C. § 706, however, a court may set aside an agency action, finding, or conclusion when it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The Estate argues, in effect, that the IRS’s decision to exclude a psychologist’s letter as evidence of financial disability is arbitrary and capricious and, therefore, the court should set it aside. Because the government has offered no evidence that the IRS had a reason that was not arbitrary for excluding psychologists from the category of professionals qualified to support a claimant’s financial disability, the court is denying the motion to dismiss.⁸⁴

The *Stauffer* opinion went on to rightly note that under the APA, while courts are not free to impose additional procedural rules on an agency,⁸⁵ they may review the reasonableness of procedures the agency does in fact choose.⁸⁶ It pressed the IRS to explain why the revenue procedure adopted a rule that accepts “certifying statements to those defined as ‘physicians’ for the purposes of collecting Medicaid payments under the Social Security Act, 42 U.S.C. § 1395x(r), and exclude[s] a psychologist who contemporaneously diagnosed and treated the individual.”⁸⁷ The district court judge suggested that there may well be a valid reason for the IRS’s rule (e.g., a rational view that only medical doctors are qualified or the need to efficiently manage claims by avoiding what might have been a case-by-case approach to evaluating psychologists), but in the absence of any offered rationale, the court concluded that there was no rational connection between facts and the IRS through its revenue procedure decision to define physician in the manner that it did.⁸⁸

81. 42 U.S.C. § 1395x(r) (2018).

82. *See id.*

83. *Stauffer v. IRS*, 285 F. Supp. 3d 474, 481 (D. Mass. 2017).

84. *Id.* at 482 (citation omitted) (quoting *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 513 (2009)).

85. *Id.* at 483 (stating that a court may not “impose upon the agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good” (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978))).

86. *Id.* at 483–84.

87. *Id.* at 485.

88. *Id.* (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In a later proceeding, the Service was able to avoid proving whether its choice was arbitrary or capricious. *Stauffer v. IRS*, No. 15-cv-10271-MLW, 2018 WL 5092886 (D. Mass. Aug. 17, 2018). The

To be sure, this brief summary of how guidance fits in with the categorization of rules under the APA omits a healthy amount of nuance, but that nuance takes us far afield from the topic of this Essay.⁸⁹ The main takeaway for purposes of this Essay is that whether the guidance that the IRS issues is a legislative rule or not, under current law there is no affirmative obligation for the IRS to consider taxpayer rights before it promulgates the guidance. In a regulation, it is possible that a third party may in the comment period raise how the regulations relate to taxpayer rights. In all guidance, it is possible that internal IRS review (including TAS) may press the IRS about the impact of the guidance on taxpayer rights through the submission of drafts known as the Green Circulation Draft.⁹⁰ It is even possible that the public may comment informally and raise taxpayer rights issues on that informal guidance, as the IRS often seeks comment from the public on many forms of subregulatory guidance. With respect to regulations, under hard-look review, it is possible that in an enforcement proceeding (such as a deficiency case or refund proceeding) a court might consider the comment, and agency evaluation of that comment in a preamble, and consider whether the agency choice passes muster. It is also possible that no party raises taxpayer rights in the comment process. With respect to subregulatory guidance, as in *Stauffer*, a court may consider whether the rule that the IRS adopts is arbitrary, but given the lack of any requirement that the IRS seek comment and publicly engage any comments it receives, it is less likely that a court would have occasion to consider the subregulatory guidance's relationship to taxpayer rights. This all suggests the minimal if nonexistent role that taxpayer rights play in possible court review of guidance, even when the IRS rulemaking might have a significant impact on the rights that Congress has identified in Section 7803.

II. BRINGING TAXPAYER RIGHTS INTO THE GUIDANCE PROCESS

A. *A Proposal: Require the IRS To Consider Taxpayer Rights Prior to Issuing Guidance*

The above summary provides a broad overview of how IRS guidance fits into overall administrative law concepts. While there is an opportunity to raise issues such as the impact of the guidance on taxpayer rights in informal commenting on drafts, there is no firm or settled legal basis for any challenge to

statute provides that an individual is not "financially disabled during any period that such individual's spouse or any other person is authorized to act on behalf of such individual in financial matters." I.R.C. § 6511(h)(2)(B) (2018). In that later proceeding, the district court concluded that the taxpayer's son had a power to act on behalf of his father during the period that the estate claimed the father was disabled. *Stauffer*, 2018 WL 5092886, at *7.

89. For a critique, see Hickman, *IRB Guidance*, *supra* note 74, at 243–52, which argues that some IRB subregulatory guidance should be considered a legislative rule and thus subject to notice and comment rulemaking.

90. The internal review process is generally accomplished in large part through the circulation of a Green Circulation Draft, which allows for a number of parties other than the drafters to raise issues and concerns with draft guidance. See IRM 32.1.2.6.2.3 (Aug. 16, 2018).

IRS guidance that fails to address the impact of the guidance on essential taxpayer rights. There is no systematic obligation for the IRS to consider the impact of a proposed rule on taxpayer rights when it issues guidance. If the IRS promulgates a regulation, taxpayers and interested parties may raise in the notice and comment period the potential impact of the regulation on taxpayer rights, and the IRS may address the impact of the regulation on taxpayer rights in finalizing its regulation. It is unclear whether the absence of IRS response to a comment on the regulation's impact on taxpayer rights would lead a court to conclude that the agency action was arbitrary or capricious. For subregulatory guidance, the IRS also has no obligation to seek comments and to consider the impact of that guidance on taxpayer rights. As the *Facebook* case illustrates, it is highly unlikely that a challenge to subregulatory guidance that arguably violated a taxpayer right would lead a court to invalidate that guidance on that basis alone.

I propose to change the relationship between agency guidance and taxpayer rights. For guidance in the form of regulations, my proposal is modeled on Section 7805(f), which requires that after publishing any proposed or temporary regulation, the IRS must submit it to the Chief Counsel for Advocacy of the Small Business Administration (SBA) for comment regarding the impact the regulation may have on small businesses. Section 7805(f) requires Treasury to consider and discuss any response to such comments in the preamble to the final regulations. To ensure that the IRS considers the impact of regulations on taxpayer rights, the IRS should be required to seek input and comment from the NTA, including specifically the NTA's views on the impact of those regulations on taxpayer rights. The IRS should be required to address those comments in a written and public response, which would typically be in the preamble to the final published regulation.⁹¹

91. I note that this proposal is similar to that made by the NTA in recommendations to Congress, including most recently in recommendation #46 of the most recent Purple Book, NAT'L TAXPAYER ADVOCATE, 2019 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 79 (2018) [hereinafter NAT'L TAXPAYER ADVOCATE, 2019 PURPLE BOOK], http://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_PurpleBook.pdf [<http://perma.cc/2FYU-VDZV>], and also recommendation #45 of the 2018 Purple Book, NAT'L TAXPAYER ADVOCATE, PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 74 (2017) [hereinafter NAT'L TAXPAYER ADVOCATE, 2018 PURPLE BOOK], http://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-ARC/ARC17_PurpleBook.pdf [<http://perma.cc/SQ6E-67BJ>]. It is also similar to a proposal I made in an earlier article that proposed ways that the IRS could better weigh the views and interests of lower-income and less resourced taxpayers that may not be adequately represented in the notice and comment process. See Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517 (2012). There is proposed legislation similar to this recommendation, though the legislation would require the IRS to solicit comments from the NTA prior to the publication of proposed or temporary regulations rather than prior to finalizing regulations. Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 404. My proposal, similar to the recommendations in the Purple Book, would shift the timing of the comments and encourage more transparency in tax administration by requiring a public written response to the NTA comments that would accompany the publication of the final regulation.

To be sure, there is nothing that currently prevents the NTA from commenting on regulations, but it is unclear whether the IRS would view the submission of comments as internal comments that the IRS would address. In fact, the NTA has on one occasion offered public written comments in response to a notice of proposed rulemaking that proposed to increase user fees on offers in compromise from \$186 to \$300.⁹² As of the date of this Essay, no final regulations proposing to raise the user fee have been issued.

It is worth a brief detour to consider the substance of the NTA comments that she submitted with respect to offer in compromise user fees. It provides a useful window into how formalizing the role of the NTA in the comment process could provide a greater opportunity to consider the meaning of taxpayer rights and also allow for the IRS to weigh other values that may necessitate a different outcome than the NTA suggests.

An offer in compromise allows the IRS to settle a tax liability for an amount less than what the taxpayer owes.⁹³ The IRS has imposed user fees of \$186 for offers in compromise and as per its notice of proposed rulemaking proposed to boost the fee to \$300.⁹⁴ The NTA comments included a number of arguments criticizing the imposition of fees, including legal arguments relating to the Independent Offices Appropriations Act of 1952 (IOAA) and the impropriety of considering IRS resource constraints as a justification for imposing the fee.⁹⁵ But importantly for the purposes of this Essay, the comments also focused directly on the relationship of fees for submitting an offer in compromise and the taxpayer's right to privacy:

Even if resource constraints were relevant, this consideration should be outweighed by taxpayer rights and public policies expressed by Congress. Section 7803(a)(3) was enacted as part of the Consolidated Appropriations Act, 2016, and provides that the Commissioner shall execute his duties in accord with taxpayer rights and shall ensure that all employees are familiar with and act in accord with taxpayer rights, including the *right to privacy*.⁹⁶

The comment went on to expand the relationship between the proposed increase in fees and the impact on the taxpayer's right to privacy:

The *right to privacy* includes the right to expect that enforcement "will be no more intrusive than necessary." As the fee will dissuade people

92. Memorandum from Nina E. Olson, Nat'l Taxpayer Advocate, to Drita Tonuzi, Assoc. Chief Counsel, (Nov. 28, 2016) (commenting on the proposed rulemaking to increase fees for offers in compromise), <http://www.regulations.gov/document?D=IRS-2016-0038-0003> [<http://perma.cc/28Y9-F7YD>]; see also User Fees for Offers in Compromise, 81 Fed. Reg. 70,654 (proposed Oct. 13, 2016) (to be codified at 26 C.F.R. pt. 300); Keith Fogg, *User Fees*, PROCEDURALLY TAXING (Dec. 14, 2016), <http://procedurallytaxing.com/user-fees/> [<http://perma.cc/Q8DY-L958>]; see also Nina E. Olson, *What's Wrong with IRS User Fees?*, TAXPAYER ADVOCATE SERV.: NTA BLOG (Apr. 18, 2018), <http://taxpayeradvocate.irs.gov/news/nta-blog-what-s-wrong-with-irs-user-fees> [<http://perma.cc/S5A9-AWMF>].

93. I.R.C. § 7122 (2018).

94. User Fees for Offers in Compromise, 81 Fed. Reg. at 70,654.

95. Memorandum from Nina E. Olson, Nat'l Taxpayer Advocate, *supra* note 92, at 2–5.

96. *Id.* at 5–6.

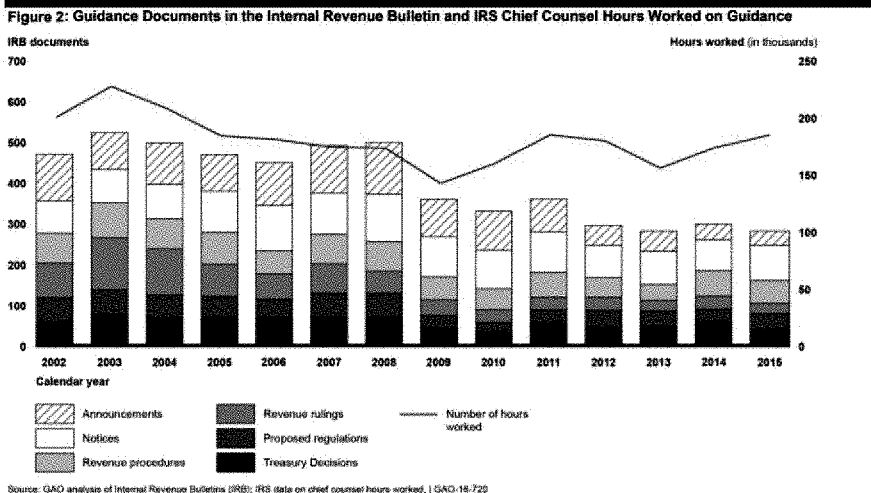
from applying for offers, thereby triggering enforcement action that would otherwise be unnecessary, the fee is inconsistent with the *right to privacy*. It makes the *right to privacy* available only to those willing to pay a user fee. Thus, the IRS's decision to raise the [offer in compromise] fee—and to raise it by an unexplained amount—seems arbitrary and unsupported by the factors set forth in IOAA.⁹⁷

It is worth considering what would happen under current law if the IRS had failed to address the NTA comments in finalizing the user fee regulations. Under current law, a third party could challenge the regulations on grounds that the IRS did not have authority under IOAA to charge the fees and that the decision to charge the fees was arbitrary and capricious.⁹⁸ It is unclear under current law whether there would be any legal significance attached to the IRS not responding to a public comment that the NTA makes; a court may view an NTA comment as part of the internal deliberations that accompanied the agency's rulemaking rather than a public comment that would generally be required to be addressed in the notice and comment process. By both formalizing the role of the NTA in the comment process and specifically tying in the requirement to consider the impact on taxpayer rights, my proposal ensures that the IRS must take into account the impact of a proposed rule on taxpayer rights, allows for a reasoned IRS response, and preserves the possibility for a court to consider whether an IRS decision in a rule impermissibly conflicts with a taxpayer right.

The proposal I suggest above is an important but insufficient step in injecting taxpayer rights considerations into the guidance process because it does not address subregulatory guidance. On an annual basis, as the below figure taken from a 2016 GAO report reflects, both in terms of IRS employee hours worked and in amount of guidance issued, the vast majority of the guidance that the IRS issues is subregulatory guidance.

97. *Id.* at 6.

98. *Cf. Montrois v. United States*, 916 F.3d 1056, 1058 (D.C. Cir. 2019) (finding that the IRS acted within its authority under the IOAA in charging tax return preparers a fee to obtain and renew special identification numbers and that the decision to charge a fee was not arbitrary and capricious under the APA).

FIGURE 2⁹⁹

Note: IRS issues some Treasury Decisions (TDs) as temporary regulations that take effect upon or soon after publication, but simultaneously publishes them as proposed regulations and solicits public comments. Temporary regulations expire after 3 years during which time IRS can issue final regulations (TDs) after considering any public comments. The figure above thus includes some double-counting of regulations issued first as temporary TDs and proposed regulations, and then later as final TDs. The data on hours represent hours worked by Office of Chief Counsel attorneys on developing guidance documents.

As I discussed above, the weekly IRB is the “authoritative instrument” for publishing official IRS rulings and procedures and tax regulations.¹⁰⁰ While there is often not a clear line between what guidance should be issued in the form of a revenue procedure as compared to a revenue ruling,¹⁰¹ revenue procedures are intended to address the “rights or duties of taxpayers or other members of the public under the Internal Revenue Code.”¹⁰² While all subregulatory guidance the IRS publishes in the IRB goes through a multistep clearance process at both Treasury and IRS, involving consultation, review, and approval by officials in numerous Treasury and IRS offices, there is no specific internal requirement that the IRS consider the impact of taxpayer rights even when it publishes a revenue procedure, which—according to the IRS itself—addresses rights and duties of taxpayers and other members of the public.¹⁰³ While the NTA is one of the officials that the IRM designates for general circulation of proposed guidance after it is approved by the Associate Chief Counsel,¹⁰⁴ the IRM does

99. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 33, at 11 fig.2.

100. *Tax Code, Regulations and Official Guidance*, IRS (Mar. 19, 2019), <http://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance> [<http://perma.cc/DX34-3HB4>].

101. See Hickman, *IRB Guidance*, *supra* note 74, at 24.

102. IRM § 32.2.2.3.2 (Aug. 11, 2004). In contrast, revenue rulings reflect “an official interpretation by the Service of the Internal Revenue Code, related statutes, tax treaties, and regulations. It is the conclusion of the Service on how the law is applied to a specific set of facts.” IRM § 32.2.2.3.1 (Aug. 11, 2004).

103. IRM 32.2.2.3.2 (Aug. 11, 2004).

104. IRM 32.2.6.4 (Oct. 28, 2011).

not specifically require that the IRS address the impact of the guidance on taxpayer rights before circulating proposed guidance internally or finalizing and publishing the guidance. In addition, while the IRM provides sample headings for revenue procedures to delineate what the procedure should address, the proposed headings do not specifically identify the impact of the guidance on taxpayer rights.¹⁰⁵ To remedy these shortcomings, I propose that Congress amend Section 7803(e) and require that the IRS adopt procedures that require input on the impact of subregulatory guidance on taxpayer rights from the NTA prior to circulation on all published guidance, and include in the general internal pre-promulgation circulation of guidance the NTA's comments and any suggested changes, including its view that the IRS should submit the proposed guidance in the form of regulations that would be subject to notice and comment.¹⁰⁶ In addition, given that revenue procedures are by their nature most likely to have a direct impact on taxpayer rights, the IRS should provide specifically that revenue procedures should have a specific section that discusses the impact of the revenue procedure on taxpayer rights, including a statement that addresses any specific concerns that the NTA raised.

B. Institutional Implications of the Proposal

Here, I discuss two significant institutional implications of my proposal for tax administration. First, I envision that by tethering the promulgation of guidance to formal TAS input about the guidance's impact on taxpayer rights, it will subject the IRS's assessment of taxpayer rights (especially with respect to regulations) to court scrutiny under the APA if a third party challenges the validity of the guidance. Second, it will help institutionalize the role of the NTA in promoting taxpayer rights, helping her effectively serve as a proxy to ensure that IRS employees are familiar with and act in accord with taxpayer rights, bringing it closer in line to the current statutory language in Section 7803(a)(3)

105. IRM 32.2.3.5.2 (Aug 11, 2004). To be sure, the IRM does provide that a revenue procedure could have other headings "as needed." *Id.*

106. As with regulations, current procedures include circulation of a draft to IRS employees (including the NTA) allowing for comment on proposed subregulatory guidance and give broad discretion to the appropriate Associate Chief Counsel to invite IRS employees to a briefing before circulation of proposed guidance. IRM 32.2.6.3 (Oct. 28, 2011). Prior to finalizing published guidance, a draft of the publication is accompanied by a Background Information Note (BIN) and, if appropriate, a legal memorandum. IRM 32.4.1 (Dec. 7, 2012). It is incumbent on the Associate Chief Counsel to determine who should provide input; my proposal formalizes the role that the NTA would have in this process and ensures that there would be an institutional presence that would trigger consideration of taxpayer rights. A recent Treasury policy statement provides that while notice and comment rulemaking is the "best practice" for agency rulemaking, "sound tax administration necessitates less formal guidance to efficiently advise the public about the meaning of the tax laws." KAUTTER & MCINTOSH, *supra* note 64, at 1–2. The policy statement states that "[s]ubregulatory guidance is not intended to affect taxpayer rights or obligations independent from underlying statutes." *Id.* at 2. A challenge for the IRS is that in many instances what are purported to be merely statements of procedure embedded in revenue procedures (or regulations) may have a material impact on taxpayer rights. See, for example, *supra* notes 75–88 and accompanying text for a discussion of the revenue procedure at issue in *Stauffer v. IRS*, which implicated the right to pay no more than the correct amount of tax and the right to a fair and just tax system.

that at least now arguably is aspirational and lacking a mechanism for enforcement.

1. APA Review

As mentioned above, under the current statutory regime it is unclear if and to what extent courts will be able to fashion a remedy for alleged IRS violations of taxpayer rights. Much of the discussion has arisen in the context of IRS enforcement actions directed at taxpayers, or, in administrative law parlance, in the context of agency adjudication.¹⁰⁷ My proposal shifts the focus on court review to the other main administrative agency function; rulemaking. To consider how my proposal will lead to court scrutiny of taxpayer rights, it is important to understand in a bit more detail the general administrative law framework associated with court review of an agency's informal rulemaking.

As a general rule, informal agency rulemaking is subject to judicial review under the arbitrary and capricious standard.¹⁰⁸ That standard applies to both regulations and subregulatory guidance, with taxpayers and affected third parties typically entitled to challenge either the procedural adequacy or substantive guidance in Tax Court or in refund suits in federal district courts or the Court of Federal Claims.¹⁰⁹ While court review under the arbitrary and capricious standard is "narrow," it does provide a mechanism to ensure that an agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"¹¹⁰ The agency must explain what justifies its rulemaking determination with actual evidence beyond a conclusory statement.

Most importantly for these purposes, if an agency fails to consider an important factor or aspect that is relevant to its action, a court can conclude that the rulemaking fails the arbitrary and capricious standard.¹¹¹ My proposal elevates taxpayer rights to relevance on all IRS rulemaking, making taxpayer rights a factor that the IRS must take into account when promulgating regulations if the NTA offers comments that address the impact of the regulations on taxpayer rights. By providing for formal input on taxpayer rights from the NTA, I would expect that a failure to adequately address taxpayer rights in response to a reasonable comment by the NTA about the regulation's

107. See, e.g., Fogg, *supra* note 27, at 709–23.

108. 5 U.S.C. § 706(2)(A) (2018).

109. While courts are more likely to apply this standard to notice and comment rulemaking, it does also apply to subregulatory guidance. See *supra* notes 83–88 and accompanying text for a discussion of *Stauffer*. See also *Am. Inst. of Certified Pub. Accountants v. IRS*, 746 F. App'x. 1, 21–22 (D.C. Cir. 2018) (applying the arbitrary and capricious standard and finding that in establishing a voluntary testing and education system for unlicensed return preparers via a revenue procedure, the IRS adequately addressed the American Institute of Certified Public Accountant's pre-adoption concerns that it shared with the IRS about public confusion over a proposed public database of return preparers).

110. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

111. *Id.*

impact on taxpayer rights (or others for that matter) in a preamble to a regulation could lead a court to remand with instructions to remedy the defect by addressing the impact. In addition, by ensuring that taxpayer rights are always a relevant factor in issuing regulations, it ensures that agency consideration of taxpayer rights is not dependent on an external third-party commentator identifying an implicated taxpayer right in the notice and comment process. This is especially important in the tax field because unlike other areas where there are dedicated public interest organizations that have a long tradition of challenging agency guidance prior to agency enforcement, there is no equivalent in the world of tax.¹¹² Moreover, as administrative law scholars have long noted, there is no guarantee that a third party (especially an unsophisticated individual taxpayer) who may be most affected by regulations will have the resources, expertise, or time to meaningfully contribute in the notice and comment process.¹¹³

By elevating the issue of taxpayer rights in subregulatory guidance, and in particular for revenue procedures as the most likely type of IRB guidance to have an impact on taxpayer rights, the proposal helps at least require the IRS to directly consider the impact of the IRB-based guidance on taxpayer rights before issuing it to the public. Administrative law scholars have identified the increased importance of guidance exempt from notice and comment rulemaking in the administrative state and have struggled to situate legitimacy of interpretive rules and statements of policy and procedure in the absence of required public participation in that process.¹¹⁴ There is also, as Professor Jessica Mantel has described, a “vigorous debate” among scholars over whether as a policy matter injecting additional procedural safeguards like notice and comment rulemaking requirements to subregulatory agency guidance is appropriate.¹¹⁵ That debate often focuses on the comparative benefits of increased participation (such as greater agency accountability and the possibility of additional viewpoints generating better rules) with the additional delay and possible ossification associated with imposing new requirements on agencies. By no means am I in this Essay attempting to resolve that debate, but I do note that my proposal falls

112. I have made a similar argument in a previous paper that recommended a stronger role for TAS in the rulemaking process. See Book, *supra* note 91. The recommendation has its roots in scholarship that looks to proxies that can further interests that may not be championed in the traditional rulemaking process. See MICHAEL SANT’AMBROGIO & GLEN STASZEWSKI, ADMIN. CONFERENCE OF THE U.S., PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 155–56 (2018), <http://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf> [<http://perma.cc/RG9Q-7XQJ>] (concluding that even after a best-efforts approach to engaging multiple perspectives in rulemaking that there may be a need for a proxy such as an ombudsman to ensure that an agency considers the views of some, especially the marginalized).

113. See, e.g., Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 84–86 (2013) (outlining barriers to participation, including at times a lack of information, too much information, and resource constraints).

114. See, e.g., Mantel, *supra* note 7, at 355.

115. *Id.* at 345–46, 382–86 (noting that proponents of additional procedural protections have traditionally focused on accuracy and rationality while opponents have emphasized the potential ossification effects).

well short of mandating public notice and comment and is likely not too cost intensive from an agency standpoint, as the IRM already identifies the NTA as a party that IRS Chief Counsel should consider consulting with in the process leading up to the issuance of all guidance.

2. The Role of the NTA and TAS

To be sure, under my proposal court review depends in large part on an active and engaged NTA that has the independence, commitment, resources, and integrity to further the interests of taxpayer rights before the broader agency, which may by design or inclination wish to minimize those rights relative to other values, such as efficiency.¹¹⁶ There is little question that the current NTA, Nina Olson, has the passion and ability to further the interests reflected in TBOR. Olson is a formidable advocate for taxpayers, recognized by the bar, scholars, and the public.¹¹⁷ For a generation of taxpayers and practitioners, she is the only person who has served as NTA. But she has announced her retirement effective July 2019.¹¹⁸ By formalizing the NTA's role to include promoting taxpayer rights in the rulemaking process, my proposal signals to the broader agency and public the foundational importance of taxpayer rights. Moreover, it helps ensure that the emphasis on taxpayer rights furthered by Nina Olson is institutionalized beyond her time in the role.

Olson herself has been signaling the need for ensuring that the NTA's role in influencing tax administration survives her tenure. In the 2018 Purple Book, which is a compilation of legislative recommendations to strengthen taxpayer rights and improve tax administration that was issued as part of the 2017 Annual Report to Congress, the NTA offered a suite of proposals to institutionalize, protect, and expand the NTA's powers and role in tax administration.¹¹⁹ One of

116. The role of TAS in tax administration has generated interest and admiration from nontax scholars who have been intrigued by the post-1998 powers that Congress has provided to TAS. See, e.g., Bryan Camp, *What Good Is the National Taxpayer Advocate?*, 126 TAX NOTES 1243, 1249 (2010) (explaining the role of the TAS as “present[ing] the taxpayer point of view to other subcomponents within the agency as a balance, counterweight, or check to insular thinking and the enforcement mentality that often pervades inquisitorial systems”). For a useful summary of the history of TAS and how it is necessary in an increasingly automated IRS, see Camp, *supra*. By my proposal I do not mean to suggest that the NTA should be the exclusive source of input on issues of taxpayer rights. Organizations such as the Tax Section of the American Bar Association and the American Institute of Certified Public Accountants are well placed to offer input, as are attorneys working with Low-Income Taxpayer Clinics.

117. In recognizing her contributions to the tax system, the American Bar Association has awarded Ms. Olson the Distinguished Service Award, *Distinguished Service Award*, ABA (Apr. 16, 2019) <http://www.americanbar.org/groups/taxation/awards/dsa/> [<http://perma.cc/UQ8F-Q2F9>], an award given to “individuals with distinguished careers in tax law and who have provided an aspirational standard for all tax lawyers to emulate,” *Distinguished Service Award Guidelines*, ABA SECTION OF TAXATION, <http://www.americanbar.org/content/dam/aba/administrative/taxation/Awards/dsa/dsaguidelines.pdf> [<http://perma.cc/5W7G-9KWW>] (last visited May 30, 2019).

118. Olson, *A Personal Message from the National Taxpayer Advocate*, *supra* note 8.

119. NAT'L TAXPAYER ADVOCATE, 2018 PURPLE BOOK, *supra* note 91, at 68–80. The proposals were repeated in the 2019 Purple Book, which accompanied the 2018 Annual Report to Congress. NAT'L TAXPAYER ADVOCATE, 2019 PURPLE BOOK, *supra* note 91, at 70–84.

her proposals included that Congress amend Section 7805 to require the IRS to submit all proposed or temporary regulations to the NTA for comment and to address those comments in a preamble to the final regulations.¹²⁰ My proposal expands on this by extending the formal role of TAS to include providing input in subregulatory guidance.

Another Purple Book proposal was that Congress should expressly grant the NTA the right to file amicus briefs.¹²¹ This may provide a useful mechanism to ensure that courts can fully consider the issues necessary for a court to apply an arbitrary and capricious standard of review to IRS guidance to ensure that the guidance does not impermissibly violate taxpayer rights. Third parties may face barriers, such as cost and lack of expertise, to making the arguments necessary for a court to fully consider the issues that would be raised in such a challenge. These barriers may dilute the effect of the proposal if one were to rely solely on private parties or individual taxpayers to litigate these issues. In addition, by providing for the NTA to have amicus powers, it would allow for a court to more seamlessly access evidence, such as any exchange between the NTA and the IRS prior to the formulation and issuance of the guidance. The NTA's unique role as both an insider and outsider prior to promulgation provides her with ready-made access to information and views that would otherwise be available perhaps only through discovery or the Freedom of Information Act, which would impose additional barriers on and increase the cost of raising taxpayer rights as a challenge to guidance.¹²²

My proposal to strengthen the role of the NTA in ensuring that the IRS more properly consider and weigh taxpayer rights in promulgating guidance has roots in broader administrative law scholarship. To understand this foundational support, I first backtrack and consider some of the criticism that the NTA has leveled at the IRS for its current mission statement. In 1998, Congress directed the IRS to revise its mission statement to place a greater emphasis on serving the public and meeting taxpayer's needs.¹²³ In response, the IRS adopted the following as its mission statement: "Provide America's taxpayers top quality

120. NAT'L TAXPAYER ADVOCATE, 2018 PURPLE BOOK, *supra* note 91, at 74. Likewise, in an earlier article, I proposed a more formal role for TAS in the rulemaking process and suggested that Congress amend Section 7805. *See* Book, *supra* note 91, at 545. The 2018 and 2019 Purple Books made eight other proposals to strengthen TAS and the NTA, including expressly giving the NTA the right to file amicus briefs in disputes. *See* NAT'L TAXPAYER ADVOCATE, 2019 PURPLE BOOK, *supra* note 91, at 70–84; NAT'L TAXPAYER ADVOCATE, 2018 PURPLE BOOK, *supra* note 91, at 68–80.

121. NAT'L TAXPAYER ADVOCATE, 2018 PURPLE BOOK, *supra* note 91, at 73.

122. To be sure, my proposal does not address the important question of whether it would be appropriate to accelerate the timing of challenges to the procedural adequacy of the guidance to include challenges prior to an enforcement action. *See* McMahon, *Pre-Enforcement Procedures*, *supra* note 63, at 1362 (arguing that Congress should repeal limitations on pre-enforcement litigation and proposing a limited time period when parties affected by the guidance should be allowed to challenge the adequacy of the guidance). While not addressing this issue directly in this Essay, I believe that Professor McMahon's insights are persuasive and would further the goal of ensuring that the IRS meaningfully engages rights by providing a timely and efficient way to ensure court review.

123. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1002, 112 Stat. 685, 690.

service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.”¹²⁴ In 2009, the IRS changed its mission statement to: “Provide America’s taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.”¹²⁵

The NTA has repeatedly called on the IRS to modify its mission statement.¹²⁶ Most recently, in the 2019 Purple Book, the NTA noted three shortcomings with the current mission statement: (1) it minimizes service and overemphasizes the role of noncompliant taxpayers by emphasizing enforcement, (2) it fails to adequately identify the IRS’s heightened role of benefits administrator, and (3) it fails to reflect the codification of taxpayer rights and its role as the foundation of tax administration.¹²⁷

In critiquing the IRS’s mission statement, the NTA touched on issues that Professor Margo Schlanger has identified as a core problem with administrative agencies, especially when Congress has entrusted agencies with tasks that some may view as subsidiary to their main tasks. In a 2014 article, Professor Schlanger discussed a variety of offices scattered throughout government, including TAS, that help ensure that agencies pay attention to certain values.¹²⁸ To Schlanger, one of the central challenges for agencies is inducing them to “do the right thing.”¹²⁹ That can be especially challenging when an agency has a principal mission and core functions that, at times, may appear to conflict with doing the agency’s principal mission. Professor Schlanger referred to constraining or conflicting values generically as “Goodness.”¹³⁰ Goodness, according to Schlanger, is effectively a stand-in for values that Congress (or another principal) wishes to ensure that an agency or bureau emphasizes while still performing its core functions.¹³¹

Schlanger highlighted an institutional approach to encouraging certain values or principles that may be absent from traditional day-to-day agency operations (or, as she described, when the principles are “less than central” to the agency): empowering offices within bureaus or agencies to promote those values by explicitly identifying an office within an agency that has them as part of

124. IRM 1.1.1.1 (Mar. 1, 2006).

125. IRM 1.1.1.2 (June 2, 2015).

126. See, e.g., NINA E. OLSON, NAT’L TAXPAYER ADVOCATE, JOINT HEARING ON IRS CUSTOMER SERVICE CHALLENGES 7–9 (2017) (prepared statement before the U.S. House of Representatives Subcommittee on Government Operations, Subcommittee on Health Care, Benefits and Administrative Rules, and Committee on Oversight and Government Reform).

127. NAT’L TAXPAYER ADVOCATE, 2019 PURPLE BOOK, *supra* note 91, at 8–9.

128. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 62–68 (2014).

129. *Id.* at 54.

130. *Id.*

131. *Id.* at 54 n.2. (explaining that Schlanger capitalizes the term “Goodness” to reflect its role as “a stand-in for something of value” rather than “as an endorsement of any particular normative judgment”).

its portfolio.¹³² Schlanger discussed one possible way that Congress could encourage agencies to promote Goodness: by creating an “Office of Goodness” within the agency that has the influence and commitment to ensure that the agency acts in a way consistent with the values that Congress or another principal promotes.¹³³

A useful example that Schlanger herself used concerns the state’s police powers.¹³⁴ We want to maintain order, but we generally do not want law enforcement to infringe upon basic civil rights in pursuit of its core public order mission.¹³⁵ Similarly, we want the IRS to effectively administer and manage our nation’s tax laws, but we also want them to respect taxpayer rights while doing so.¹³⁶ Congress’s codification of TBOR following the IRS’s own adoption of the taxpayer rights reflects a recognition that in administering the tax system, there are fundamental taxpayer rights that should not only inform the IRS about how it should perform its functions but also at times constrain the IRS to ensure that its actions do not infringe upon those rights. In a very real way, the taxpayer rights now embedded in the Internal Revenue Code reflect the Goodness that Congress has identified as a crucial part of tax administration.

The insights of Professor Schlanger are related to other scholars who have recognized that marginalized interests or some perspectives may be inadequately represented in the agency rulemaking and guidance process.¹³⁷ Some of these scholars have emphasized that empowering proxies may at times be a useful way to ensure that an agency consider other interests and values, especially when those values may not be championed by sophisticated or well-resourced parties.¹³⁸ To that end, a recent report of the Administrative Conference of the

132. *Id.* at 55, 60–61. The offices can vary in terms of features, such as structure and precise powers, but they share three key characteristics: they help other parts of the agency get the agency’s work done, they are value infused, and they are internal and dependent on the broader agency. *Id.* at 60–61.

133. *Id.* at 61. In addition, Schlanger identified the key role that commitment and influence play in the office’s success; both rely critically on external reinforcement. *Id.* at 103–16.

134. *Id.* at 54.

135. Schlanger noted, for example, that the National Security Agency under the Obama administration established an office of civil liberties and privacy; the paradigmatic Office of Goodness in Schlanger’s article is the Department of Homeland Security Office for Civil Rights and Civil Liberties. *Id.* at 54–56.

136. The IRS mission statement is to “[p]rovide America’s taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.” IRM § 1.1.1.2 (June 2, 2015). In framing its role, the IRS views itself as helping the large majority of compliant taxpayers understand and comply with their tax obligations while at the same time ensuring that the minority of taxpayers “unwilling to comply pay their fair share” of the burden. *Id.*

137. See Arthur Earl Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 511–16 (1969); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1413–14 (2010).

138. See, e.g., Wagner, *supra* note 137, at 1414 (2010) (suggesting that agencies use government intermediaries like advocates or ombudsmen “to stand in for significantly affected interests that might otherwise be underrepresented in rulemakings”). Professor Wagner, writing in the context of environmental rulemaking, has called for the deployment of government intermediaries and ombuds

United States emphasized the possible role for proxies even after identifying numerous ways that agencies may engage and encourage public participation in rulemaking.¹³⁹ Other scholars have suggested expanding at least parts of notice and comment procedures to rules that would otherwise be exempt due to their classification as procedural rules or agency statements of policy.¹⁴⁰ These scholars have noted that a more robust consideration of perspectives in the rulemaking process can improve rulemaking quality, encourage agency accountability, and enhance public acceptance of the rules themselves.¹⁴¹

CONCLUSION

Speaking before the adoption and codification of TBOR, the NTA, in her 2013 Woodworth Memorial Lecture, discussed why she believed that if a tax agency fails to make taxpayer rights the linchpin of tax administration it loses its “heart and soul”:

This is what taxpayer rights are about—protecting them not only recognizes the taxpayer’s human condition but also reminds us of our own humanity. It saves us from our prejudices and our preconceived notions. It makes it impossible for us to think of taxpayers as widgets or cases or pieces of paper. Even more than being about the taxpayer’s humanity, taxpayer rights are about reclaiming our own humanity.¹⁴²

Administering today’s tax system is no easy task. Congress expects the IRS to collect revenues and administer social programs. It is easy to lose sight of the human costs associated with an imperfect and increasingly automated tax administration.¹⁴³ Yet the IRS has a lot on its plate; at times it, as an organization, will impose rules that emphasize convenience to a degree that impermissibly tramples taxpayer rights, at least without being required to directly consider and perhaps address the impact of the rules on the taxpayers’ rights at issue.

By shifting the discussion of taxpayer rights away from TBOR’s role in individual taxpayer disputes with the IRS (where many unrepresented and

offices to participate in rulemaking, with the hope that the comments would alert the EPA to differing interests, potentially be used by other regulatory participants, and also possibly in court review of the guidance. *Id.* at 1414–15; see also Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1655–56 (2011) (emphasizing the NTA’s success in presenting the taxpayer point of view to the IRS itself and suggesting that the NTA is a successful model for other agencies).

139. SANT’AMBROGIO & STASZEWSKI, *supra* note 112, at 155–56 (“[D]esignated representatives of missing stakeholders could provide agencies with a more complete and well-balanced array of views and perspectives and thereby further improve the democratic legitimacy, effectiveness, and accountability of the rulemaking process.”).

140. See, e.g., Mantel, *supra* note 7, at 348.

141. See, e.g., *id.* at 346–47.

142. Olson, *A Brave New World*, *supra* note 21, at 1199.

143. The challenges associated with automation are not unique to the IRS. See generally VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (St. Martin’s Press 2017) (critiquing an on-the-surface neutrality associated with the government’s use of high-tech tools such as data mining and predictive risk models that often mask biases and can have a devastating impact among poor and marginalized communities).

low-income taxpayers fail to even respond to any IRS correspondence)¹⁴⁴ and toward the impact of rights on the IRS's proposed rules, my proposal puts the burden on the IRS to consider how its actions relate to people as human beings rather than just anonymous taxpayers. It forces the IRS to consider interests beyond government efficiency and convenience. It also allows the IRS to think through more carefully and perhaps explain the rationale of decisions that may, to some, reflect an improper weighing of individual interests as compared to the government's interest in efficiently collecting taxes.

My proposal is one way among many others that can help transform the vision of taxpayer rights as a foundation of tax administration. It is not sufficient. For example, there are some instances when the lack of published guidance itself is what jeopardizes taxpayer rights, and my proposal does not in any way compel the IRS to issue guidance to address rights that are jeopardized by the absence of guidance.¹⁴⁵ Many important IRS decisions that have an impact on taxpayer rights are embedded in the agency's own IRM,¹⁴⁶ and my proposal would likely have no impact on those provisions. The many limits on pre-enforcement litigation attacking the procedural validity of IRS guidance would still serve as a barrier to early challenge to guidance. Some ways to protect taxpayer rights await legislative fixes both to the Internal Revenue Code, such as clear authority for the IRS to regulate tax return preparers. In addition, other important measures (some of which are ongoing) include assessing and reporting on IRS performance as it relates to taxpayer rights, training employees to become more aware how agency actions have an impact on taxpayer rights, and designing compliance programs around a respect for an emphasis on taxpayer rights.

Imposing additional procedural requirements of the type I suggest is not costless. TAS has many responsibilities, and shifting affirmative burdens on it will require additional resources or perhaps divert it from other responsibilities.¹⁴⁷ One of the main arguments I can envision against my proposal

144. Michelle Lyon Drumb, *Those Who Know, Those Who Don't, and Those Who Know Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns*, 11 PITT. TAX REV. 113, 137 (2013) (discussing TAS research on the almost seventy percent nonresponse rate of EITC recipients who receive correspondence examination correspondence).

145. See, e.g., NAT'L TAXPAYER ADVOCATE, 2018 PURPLE BOOK, *supra* note 91, at 26–27 (suggesting that regulations be issued under Section 7502 to ensure consistent treatment of the mailbox rule to electronically submitted documents and payments).

146. For example, consider the IRS's application of its first-time abatement policy for civil tax penalties. For a discussion of its application and impact on the right to pay no more than the correct amount of tax, the right to challenge the IRS position and be heard, and the right to a fair and just tax system, see Nina E. Olson, *The Systemic First Abatement Policy Currently Under Consideration by the IRS Would Override Reasonable Cause Relief and Jeopardize Fundamental Taxpayer Rights*, TAXPAYER ADVOCATE SERV.: NTA BLOG (Aug. 29, 2018), <http://taxpayeradvocate.irs.gov/news/NTA-blog-Systemic-Abatement?category=Tax%20News> [<http://perma.cc/CMK8-EXRA>].

147. There may be other institutional actors that could play a role. The recent injection of OMB into the regulator process may present an opportunity for OMB to play an institutional role in ensuring that guidance appropriately considers the impact on taxpayer rights. See *supra* note 38 and accompanying text. The impact of OMB on IRS guidance is a topic that will likely attract significant attention in the near term. See Jonathan Curry, *Behind the Scenes at OMB: How's That New*

is that it will invite litigation, given that some of the rights enumerated are more ambiguous than others. In addition my proposal might give well-resourced taxpayers additional ammunition to challenge IRS guidance at a time when IRS resources are spread thin; there is some irony in that the initial challenge to subregulatory guidance based on a TBOR argument was brought by Facebook rather than a low- or moderate-income taxpayer that my proposal is intended to primarily benefit. Moreover, my proposal runs the risk of making the tax system less efficient by elevating and maybe equating the taxpayer's interest in a tax system that respects taxpayer rights with the longstanding tradition of considering the government's interest in efficiently collecting taxes. To be sure, through barriers like the Anti-Injunction Act,¹⁴⁸ the IRS has historically enjoyed less scrutiny over its rulemaking than other federal agencies. My proposal imposes some additional costs on IRS in terms of resources and time, which is especially challenging for an agency that has faced major funding pressures while Congress increasingly relies on using the tax system for myriad social goals.¹⁴⁹ Additional procedural obligations associated with issuing guidance may contribute to the IRS being less willing to promulgate guidance, leaving the taxpaying public and practitioners to face perhaps an uncertain legal landscape or contributing to less guidance and an agency relying more on a case-by-case approach to tax administration.¹⁵⁰

Despite these concerns, the codification of taxpayer rights and its uncertain perch in tax administration presents an opportune time to consider some of these longstanding barriers to scrutiny of the IRS (including the limits on challenging guidance outside enforcement cases, such as deficiency or refund litigation), especially when the rights themselves reflect values that Congress has singled out for importance. I expect that over time, the IRS would view a dynamic relationship between its, TAS's, and the courts' views of rights as enormously beneficial to tax administration. Increasing the prominence of taxpayer rights through proposals such as mine tethers the tax system to the broader interest we as Americans all share in a fair and just government. Reflexively, we can expect the IRS to consider the efficient collection of taxes. By requiring the IRS to consider taxpayer rights in the rulemaking process, Congress can ensure that the IRS directly considers the impact of its decisions on the fundamental rights that Congress has identified as symbolizing a fair and just tax system.

Agreement Working Out?, 160 TAX NOTES 1762, 1762 (2018) (noting that the OMB's new regulatory review process is "shaking up rulemaking").

148. See generally Hickman & Kerska, *supra* note 12 (discussing the history of the Anti-Injunction Act and arguing for a more limited role in its preventing pre-enforcement challenges).

149. For more on the IRS's funding challenges, see Chuck Marr et al., *IRS Budget Needs To Be Restored and Supplemented To Enforce the New Tax Law*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 25, 2018), <http://www.cbpp.org/research/federal-tax/irs-budget-needs-to-be-restored-and-supplemented-to-implement-and-enforce-the> [<http://perma.cc/AS7L-S4UP>] (detailing multiyear declines in IRS budget and employees while being faced with additional responsibilities).

150. This critique has similarly been made by those warning against allowing expanded pre-enforcement challenges to tax regulations. See Hemel, *supra* note 12, at 84.
